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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

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| THE PEOPLE,<br>Plaintiff and Respondent,<br>v.<br>JONATHAN CRAIG ELFAND,<br>Defendant and Appellant. | A133600<br><br>(Sonoma County Super. Ct. No. SCR570451) |

Defendant Jonathan Craig Elfand appeals from his conviction of violating Health and Safety Code 11360, subdivision (a), following his negotiated plea of no contest to felony transportation of marijuana. His appellate counsel filed an opening brief that raises no issues and asks this court for an independent review pursuant to *People v. Wende* (1979) 25 Cal.3d 436. Defendant was notified of his right to file a supplemental brief and has done so, raising several issues that we discuss below. After independent review, we affirm the judgment.

## BACKGROUND

The following facts are drawn from the transcript of Elfand's preliminary hearing. On September 26, 2009, Sonoma County Deputy Sheriff Tommy McNeil went with his patrol dog to a Roadway Express Transport (RET) facility in Santa Rosa. There he spoke with the manager, Jerry Sciortino, who had called to report his suspicion that a pallet delivered for transport by a regular customer contained controlled substances. McNeil

brought his dog into the shipping bay and led it first to some unsuspected pallets before leading it to the pallet that Sciortino suspected. Only then did the dog display a "positive alert"—staring at the pallet while remaining still and breathing deeply through his muzzle. At that point, McNeil "felt there [were] narcotics on the pallet," but told Sciortino he could not open the pallet. McNeil placed a call to the sheriff's department to obtain the contact number for the on-call narcotics detective, Deputy Sheriff Andrew Cash.

The suspect pallet consisted of a wooden base, on which miscellaneous cardboard boxes had been stacked and then shrink wrapped. Before McNeil and his canine had arrived, Sciortino, on his own, opened the top of the shrink wrapping and removed two of the cardboard boxes. Taking one of these boxes out of the shipping bay and into his office, Sciortino opened it and found readily identifiable items—containers of organic apple sauce and fruit juice—which were listed on the customer's description of the pallet contents. There were also some unlabeled, sealed metal cans—resembling "old style coffee cans"—which were not included in the customer's description.

After the canine alerted to the suspect pallet, and McNeil was waiting to speak with Detective Cash, Sciortino informed McNeil there was an RET policy that authorized him to open and inspect materials submitted for shipping, when it appeared the materials did not match the customer's description of contents on the shipping label.[1] Noting the unlabeled metal cans did not match the description of contents, Sciortino asked McNeil to open one of those he had observed when he opened one of the cardboard boxes in his office. McNeil, "at [Sciortino's] discretion," then opened two of the cans and found they contained marijuana. McNeil then spoke with Cash, who advised McNeil to secure the pallet until they could obtain a warrant to search it.

After obtaining the warrant (the first search warrant), based on a report by McNeil, Detective Cash visited the RET facility on September 28, 2009. Sciortino informed Cash

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[1] The standard bill of lading used by RET included a notice to customers that " 'all cargo tendered for transport is subject to inspection,' " and " 'by tendering cargo[, the] shipper grants to consent to such an inspection.' "

the suspect pallet had been delivered by a "Sam Grotto," who delivered pallets for transport to New York addresses on a number of occasions, using a rental Penske truck. Cash then seized the suspect pallet, and inventoried its contents. He found, among other contents, 34 unlabeled, sealed metal cans containing a total of about seven pounds of bud marijuana.

Detective Cash then contacted the manager of a Penske rental facility in Santa Rosa. Cash provided the manager with the cell phone number that "Grotto" had provided to RET, and the manager matched that number with one provided by a "Harry Ramos," who had rented Penske trucks on multiple occasions. According to the manager, the trucks "smelled like marijuana" when they were returned. Moreover, "Ramos" was scheduled to pick up another rental truck later that day, September 28. Cash set up surveillance at the Penske facility and waited for "Ramos" to arrive. Later, two individuals drove up in a sedan. The passenger of that vehicle—subsequently identified as Elfand—went inside to pick up a rental truck as "Ramos."

Detective Cash confirmed with the manager that this person was "Ramos." Then he and other members of the Narcotics Task Force followed the rental truck to an address on Timber Hill Road outside of Santa Rosa. Because Cash knew there were very few homes on the road, only a single vehicle with Cash and another detective followed the truck up Timber Hill Road. After driving up several individual driveways, they spotted the Penske truck, and both officers smelled marijuana "coming from the general area" of the residence where the truck was parked. At that point, they were still on the driveway, at least 75 to 100 yards from the residence and some 30 to 50 yards from an open gateway to the property.

Detective Cash, concerned that they may have been seen, made a decision to secure the residence pending the issuance of a search warrant. After the rest of the surveillance team arrived, officers approached the residence, knocked, and detained Elfand. Cash then left to obtain a warrant to search the property (the second search warrant), returning with the warrant that evening, September 28, 2009. In a search of the residence and two smaller buildings, officers found and seized approximately 20 pounds

of bud marijuana in various stages of processing, some of which had been sealed into metal cans like those seized from "Grotto's" pallet. Other items seized included incriminating documents and receipts, caches of cash totaling about $25,000, empty metal cans, a machine for sealing the cans, and a digital scale. Elsewhere on the property, officers found a garden of 144 flowering, budded marijuana plants.

A complaint filed September 30, 2009 charged Elfand with felony violations of Health and Safety Code sections 11358 (cultivation of marijuana), 11359 (possession of marijuana for sale), and 11360, subdivision (a) (transportation of marijuana). He initially pleaded not guilty. On July 20, 2010, the trial court granted Elfand's *Faretta* motion[2] to relieve his appointed counsel and permit him to represent himself.

On September 23, 2010, Elfand filed a motion to suppress evidence based on unlawful searches of his pallet and his property. (Pen. Code, § 1538.5.) The magistrate denied this motion at the conclusion of the preliminary hearing on March 11, 2011, and proceeded to hold Elfand to answer the charges against him.

An information filed March 22, 2011 restated the charges of the complaint. On that same date, Elfand filed a demurrer to the information for lack of subject matter jurisdiction, arguing that the enactment of the state's medical marijuana law had effectively "redacted" marijuana from the Schedule I list of controlled substances and, thus, rendered "without power of law" the Health and Safety Code sections that he had been charged with violating. The following week, on March 28, Elfand pleaded not guilty to the charges in the information and the trial court overruled his demurrer.[3]

On April 11, 2011, Elfand filed a motion under Penal Code section 995, arguing the magistrate had erred in denying his motion to suppress. The trial court denied the

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[2] *Faretta v. California* (1975) 422 U.S. 806, 835–836.

[3] This court denied Elfand's petition for extraordinary writ, seeking review of the trial court's order overruling the demurrer. (*Elfand v. Superior Court* (May 18, 2011, A131754).)

motion on May 19.[4] Elfand, on June 21, filed another motion to suppress under Penal Code section 1538.5, arguing, for the most part, the same grounds as in his first motion. On July 12, the court denied this motion on the ground there was no new evidence that could not reasonably have been presented at the preliminary hearing. (See Pen. Code, § 1538.5, subd. (i).)

On August 18, 2011, Elfand accepted a prosecution offer whereby he changed his plea to no contest to the charge of violating Heath and Safety Code section 11360, subdivision (a) (transportation of marijuana). The trial court dismissed the remaining charges, denied probation, and on September 30 sentenced Elfand to 12 months' incarceration in county jail, with credit for time served. The court's calculation of credits, 1405 days, indicated Elfand had already served in excess of 12 months and, accordingly, it ordered his immediate release from jail.

Meanwhile, the prosecution filed a notice of seizure and intended forfeiture on October 20, 2009, regarding $22,826 that officers had seized during the execution of the second search warrant. (Health & Saf. Code, § 11488.4, subd. (j).) Elfand filed a claim opposing the forfeiture on November 25, 2009. (Health & Saf. Code, § 11488.5, subd. (a)(1).) On April 4, 2011, Elfand then filed a motion seeking to recover the seized currency in the amount of $25,071, to which he argued he was entitled because the prosecutor had not filed a timely petition of forfeiture after he filed his own claim opposing forfeiture, as required by Health and Safety Code section 11488.4, subdivision (j), and any petition of forfeiture was now barred by lapse of the one-year limit set out in Health and Safety Code section 11488.4, subdivision (a). (See *People v. Property Listed in Exhibit One* (1991) 227 Cal.App.3d 1, 4.) Following the filing of this motion, the prosecutor presented a motion to strike Elfand's claim opposing forfeiture, because it had not been filed within 30 days after the notice of intended forfeiture, as required by Health and Safety Code section 11488.5, subdivision (a)(1). The trial court agreed, and on

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[4] Elfand sought review of the trial court's denial of his motion under Penal Code section 995 by petition for extraordinary writ, which this court denied. (*Elfand v. Superior Court* (June 15, 2011, A132193).)

June 8, 2011, granted the motion to strike Elfand's claim opposing forfeiture and ordered that Elfand had forfeited any interest in the currency.

Elfand sought review of that ruling by petition for extraordinary writ, and on August 24, 2011, this court concluded there was insufficient evidence that the prosecutor had provided Elfand with proper notice of the initiation of forfeiture proceedings under Health and Safety Code section 11488.4, subdivision (j). Consequently, we directed the issuance of an alternative writ of mandate, compliance with which required the trial court to set aside its order striking Elfand's claim opposing forfeiture, and declared that claim to be filed as of the date of its compliance with the alternative writ. We further gave the prosecution 30 days from that date to file a petition of forfeiture pursuant to Health and Safety Code section 11488.4, subdivision (j). (*Elfand v. Superior Court* (Aug. 24, 2011, A132539).) The lower court complied with the alternative writ on August 30, and on September 8 the prosecution filed its petition for forfeiture.

Elfand immediately filed a motion seeking dismissal of the petition and return of the property, arguing the prosecution could not show probable cause establishing that the seized currency was subject to forfeiture under Health and Safety Code section 11470, primarily because the petition was barred by the lapse of the one-year limit set out in Health and Safety Code section 11488.4, subdivision (a). (See Health & Saf. Code, § 11488.4, subd. (h).) The trial court denied the request for dismissal on September 27, 2011. On September 30, the prosecutor indicated for the record that he and Elfand had signed a stipulated agreement whereby currency in the amount of $16,000 would be returned to Elfand, and the remaining currency in the amount of $6,826 was to be ordered forfeited. The court, on that same date, entered orders to that effect, and further noted that Elfand "waive[d] appellate rights as to [the] agreement."

Elfand appealed. (See Pen. Code, § 1237.5.)

## DISCUSSION

Elfand first contends the trial court erred in denying his demurrer on the ground that it lacked subject matter jurisdiction. He argues, as he did below, that the enactment of the state's medical marijuana law had the effect of removing marijuana from the

Schedule I of controlled substances, but the enactment failed to add marijuana to another schedule and, hence, marijuana is no longer a controlled substance. The simple answer to this is that the medical marijuana law did not remove marijuana from Schedule I—it remains in that schedule as a hallucinogenic substance. (Heath & Saf. Code, § 11054, subd. (d)(13).) The medical marijuana law operates to shield patients and primary caregivers from "criminal prosecution or sanction," and also makes Health and Safety Code sections 11357 (simple possession) and 11358 (cultivation) expressly inapplicable to a patient or primary caregiver who possesses or cultivates marijuana for "personal medical purposes." (Heath & Saf. Code, § 11362.5, subds. (b)(1)(B) & (d).) But the Legislature did not intend for this law to supersede legislation prohibiting persons from engaging in conduct that endangers others, nor condone marijuana use for nonmedical purposes. (See Health & Saf. Code, § 11362.5, subd. (b)(2).) Thus, Health and Safety Code sections 11358, 11359, and 11360 remain operable to prohibit possession for sale, cultivation, and transportation of marijuana for nonmedical purposes.

Elfand next argues that the trial court erred in denying his motion under Penal Code section 995, in which he sought to set aside the information on the ground that the magistrate erred in denying his first motion to suppress evidence. He advances a number of issues in support of this claim: (1) there was no "independent source" providing probable cause for the first search warrant prior to Deputy McNeil's conduct in opening the metal cans and searching the pallet, nor any indication before that conduct that he had made a decision to secure a warrant; (2) the canine alerting to his pallet was itself an unlawful "search" because it is possible to possess marijuana legally in California and, thus, a dog search no longer simply points to the location of contraband that no one has a right to possess; (3) the smell of marijuana, by itself, did not provide probable cause for the second search warrant because it is possible to possess marijuana legally in California and, thus, the smell of marijuana does not automatically signify criminal conduct; (4) the prolonged seizure of the pallet, while Detective Cash obtained the first search warrant, was unreasonable because Cash did not "diligently" seek to obtain the warrant; and (5) the affidavit for the first search warrant contained a false statement because

Sciortino's testimony at the preliminary hearing showed that McNeil's canine did not display a "positive alert," as McNeil claimed in the affidavit.

The "independent source" that provided probable cause for the first search warrant was, as the magistrate found, the "canine sniff," which occurred before Deputy McNeil opened the metal cans or otherwise inspected the contents of the pallet. (See *People v. Bautista* (2004) 115 Cal.App.4th 229, 236.) We agree with the magistrate's conclusion that the "canine sniff" in these circumstances did not constitute a "search" within the meaning of the Fourth Amendment. (*United States v. Place* (1983) 462 U.S. 696, 707.) We further agree with the magistrate's conclusion that the detection of the odor of marijuana by Detective Cash, while rightfully standing in the driveway beyond the property, did not constitute an unlawful search and provided probable cause for the second search warrant. (*People v. Cook* (1975) 13 Cal.3d 663, 668, disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421 & fn. 22.) The case law supporting these conclusions has not been invalidated by the state's medical marijuana law, which, as we have noted, does not supersede the general law against possession or cultivation of marijuana for nonmedical purposes, but extends only a limited protection from criminal prosecution to qualified patients and their primary caregivers so that they might possess or cultivates marijuana for "personal medical purposes." (Heath & Saf. Code, § 11362.5, subd. (d).) By no stretch of the imagination could the marijuana detected by the canine sniff—which was on its way to New York—be regarded as marijuana possessed for "personal medical purposes" by a California patient or primary caregiver. Nor is it reasonable to suppose that the amount of marijuana that a patient or primary caregiver might cultivate for "personal medical purposes" would generate an odor detectible from 75 to 100 yards away.

The pallet was secured by Sciortino at RET over the weekend. We see no merit in the argument that Detective Cash rendered the search unreasonable by failing to act with sufficient "diligence" in seeking the warrant. As for the statement of Deputy McNeil, included in the affidavit for the first search warrant, to the effect that his canine displayed a "positive alert" to the suspect pallet, that statement is fully supported by McNeil's

testimony at the preliminary hearing. It is evident the magistrate found it more credible than Sciortino's somewhat inconsistent statement that the dog had barked. In reviewing the denial of a motion under Penal Code section 995, we directly review the determination of the magistrate, and as a reviewing court we do not substitute our judgment for that of the magistrate with regard to the credibility of witnesses. (See *People v. Laiwa* (1983) 34 Cal.3d 711, 718.)

Finally, Elfand urges that the trial court erred in its ruling on September 27, 2011, in which it denied his request to dismiss the prosecution's petition of forfeiture. He reasons the court lacked jurisdiction to order a forfeiture due to the lapse of the one-year limit for filing a petition of forfeiture set out in Health and Safety Code section 11488.4, subdivision (a). As noted above, however, Elfand signed a stipulated agreement three days after this ruling—an agreement that essentially resolved the forfeiture proceeding—and the court entered an order on that date that carried the stipulation into effect. As the court noted in its order, Elfand, by entering the stipulation, effectively waived any right to contest the forfeiture proceeding on appeal.

After review of the record and finding no merit in the issues raised by Elfand in his supplemental brief, we do not find any other arguable issues to brief.

**DISPOSITION**

The judgment is affirmed.

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Marchiano, P.J.

We concur:

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Dondero, J.

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Banke, J.